M/047/0032
cc: Leslie

Steven J. McCardell (2144)
smccardell@djplaw.com
Kenneth L. Cannon II (3705)
kcannon@djplaw.com
DURHAM JONES & PINEGAR, P.C.
111 East Broadway, Suite 900
P.O. Box 4050
Salt Lake City, UT 84110-4050
Telephone: (801) 415-3000
Facsimile: (801) 415-3500

Attorneys for the Debtors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re: KOREA TECHNOLOGY INDUSTRY AMERICA, INC. et al., Debtors.	Bankruptcy Case No. 11-32259 Jointly Administered Chapter 11 Honorable R. Kimball Mosier [FILED ELECTRONICALLY]

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THEIR FIRST AMENDED JOINT PLAN OF REORGANIZATION DATED JULY 25, 2012

TABLE OF CONTENTS

INTRODUCTION 1

VOTING 2

I. All Classes Voting Except One Have Accepted the Plan. 2

ARGUMENT 3

I. The Plan Should Be Confirmed 3

A. The Plan Complies with Applicable Provisions of the Bankruptcy Code (Section 1129(a)(1)). 3

1. The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code. 4

2. The Plan Satisfies the Eight Mandatory Plan Requirements Contained in Section 1123(a)(1)-(a)(8) of the Bankruptcy Code. 6

3. The Discretionary Contents of the Plan Are Appropriate. 8

B. The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(2)) 9

C. The Plan Has Been Proposed In Good Faith And Not By Any Means Forbidden By Law (Section 1129(a)(3)) 10

D. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments (Section 1129(a)(4)) 12

E. The Debtors Have Disclosed All Necessary Information Regarding Management of the Reorganized Debtor (1129(a)(5)) 13

F. The Plan Does Not Require Governmental Regulatory Approval for Rate Changes (Section 1129(a)(6)). 14

G. The Plan Is in the Best Interests of Creditors and Interest Holders Who Have Not Accepted the Plan (Section 1129(a)(7)). 14

H. Acceptance by Impaired Classes (Section 1129(a)(8)) 16

I. The Plan Complies with Statutorily Mandated Treatment of Administrative And Priority Tax Claims (Section 1129(a)(9)). 17

J. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders (Section 1129(a)(10)). 18

K. The Plan Is Feasible (Section 1129(a)(11)). 19

L. The Plan Provides for the Payment of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12)) 21

M. The Plan Does Not Modify Retiree Benefits (Section 1129(a)(13)) 21

N. Section 1129(a)(14), (a)(15), and (a)(16) Are Inapplicable 21

O. The Plan Satisfies the "Cramdown" Requirements (Section 1129(b)) 22

1. The Plan Is Fair and Equitable with Respect to Impaired Classes that Have Not Voted to Accept the Plan. 22

2. The Plan Does Not Unfairly Discriminate with Respect to Impaired Classes that Have Not Voted to Accept the Plan. 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

203 N. LaSalle St., 526 U.S. at 441 n.13 ..... 14, 25, 27

In re A.H. Robins Co., Inc., No. 98-1080, 1998 WL 637401, at *3 (4th Cir. Aug. 31, 1998) 10

In re Adamson Co., Inc., 42 B.R. 169, 174 (Bankr. E.D. Va. 1984) 19, 22

In re Adelphia Commc'ns. Corp., 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) 14

In re Avia Energy Dev., L.L.C., No. 05-39339-BJH-11, 2007 WL 2238039, at *2 (Bankr. N.D. Tex. Aug. 2, 2007) 4

In re Bowles, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) 26

In re Briscoe Enters., Ltd., II, 994 F. 2d 1160, 1167 (5th Cir. 1993) 11

In re Bugg, 172 B.R. 781, 784 (E.D. Pa. 1994) 5

In re Catron, 186 B.R. 194, 197 (Bankr. E.D. Va. 1995) 22

In re Chateaugay Corp., 10 F.3d 944, 956-57 (2d Cir. 1993) 4

Colorado Mountain Express v. Aspen Limousine Service (*In re Aspen Limousine Service*), 193 B.R. 325, 340 (D. Colo. 1996) 4

In re Crosscreek Aparts., Ltd., 213 B.R. 521, 537 (Bankr. E.D. Tenn. 1997) 26

In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992) 13, 16

In re Econ. Cast Stone Co., 16 B.R. 647, 651 (Bankr. E.D. Va. 1981) 16, 18

F.H. Partners, L.P. v. Investment Co. of the Southwest, Inc., 341 B.R. 298, 310 (10th Cir. BAP 2006) 3, 19

In re Freymiller Trucking, Inc., 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) 26

Heins v. RUTI-Sweetwater, Inc. (*In re RUTI-Sweetwater, Inc.*), 836 F.2d 1263, 1265 (10th Cir. 1988) 22, 23, 24, 25

In re Kaiser Aluminum Corp., No. 02-10429, 2006 WL 616243 (Bankr. D. Del. Feb. 6, 2006) 4

In re Lernout & Hauspie Speech Prods., N.V., 301 B.R. 651, 661 (Bankr. D. Del. 2003) 26

In re Madison Hotel Assoc., 749 F.2d 410, 425 (7th Cir. 1984) 11

Mirant Corp., No. 03-46590-MDL-11, 2007 WL 1258932, at *7 4

In re Paige, 2007 WL 4143212 *7 (Bankr. D. Utah 2007) 3, 4

In re Pikes Peak Water Co., 779 F.2d 1456, 1459 (10th Cir. 1985) 11, 19

Schwarzmann, 203 B.R. at 923, 925 22
In re Sun Country Dev., Inc., 764 F.2d 406, 408 (5th Cir. 1985) 11
In re Sylmar Plaza, L.P., 314 F.3d 1070, 1074 (9th Cir. 2002) 11
T-H New Orleans, 116 F.3d at 802 11
United States v. Energy Res. Co., 495 U.S. 545, 549 (1990) 19
Valley View Shopping Center, 260 B.R. 10, 22-23 (Bankr. D. Kan. 2001) 13
In re Winn Trucking, Inc., 236 B.R. 774, 778 (Bankr. D. Utah 1999) 3
In re Worldcom, Inc., No. 02-13533, 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) 9

Statutes

11 U.S.C. § 101 1
11 U.S.C. § 1107 1
11 U.S.C. § 1108 1
11 U.S.C. § 1114 21
11 U.S.C. § 1122 ..... 3, 4, 5
11 U.S.C. § 1123 ..... passim
11 U.S.C. § 1125 ..... 9, 10
11 U.S.C. § 1126 ..... 9, 16
11 U.S.C. § 1129 ..... passim
11 U.S.C. § 507 17
11 U.S.C. § 510 27
11 U.S.C. § 511 18
28 U.S.C. § 1408 1
28 U.S.C. § 1409 1
28 U.S.C. § 157 1
28 U.S.C. § 1930 ..... 17, 21
28 U.S.C. §1334 1

Other Authorities

H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977) 4, 27
S. Rep. No. 989, 95th Cong. 2d Sess. 123 (1978) 16
S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978) 4

Debtors Korea Technology Industry America, Inc. ("KTIA"), Uintah Basin Resources, LLC ("UBR"), and Crown Asphalt Ridge, L.L.C. ("CAR"), debtors and debtors in possession (together, KTIA, UBR, and CAR are sometimes referred to as the "Debtors"), hereby submit this memorandum in support of confirmation of their First Amended Joint Plan of Reorganization dated July 25, 2012 (the "Plan"). The Debtors believe that the Plan meets the standards of section 1129 of the Bankruptcy Code and request entry of an Order confirming the Plan.

INTRODUCTION

1. Case Information. The Debtors commenced these cases under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"), by filing voluntary petitions on August 22, 2011 (the "Petition Date").

2. Jurisdiction, Venue, and Core Proceeding. This Court has jurisdiction under 28 U.S.C. §§ 157 and 1334. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (L), (N), and (O) and the Court has jurisdiction to enter a final order.

3. Debtors Operating as Debtors in Possession. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. Background of the Plan. The Debtors have been working on several critical tasks since the commencement of their reorganization cases: obtaining sufficient financing to operate during chapter 11 and to complete construction and commissioning of the "dry froth circuit" of the Debtors' tar sands processing facility, obtaining clear title to and selling their assets and businesses for an amount sufficient to pay creditors in full, resolving issues with respect to

Claims held by creditors, and confirming a plan of reorganization which provides for distribution of the sale proceeds. Section III of the Disclosure Statement sets forth this background in detail and is incorporated herein by this reference.

5. No Modifications to the Plan Have Been Made. As of the filing of this Memorandum, the Debtors have not proposed any modifications to the Plan. They do not believe any modifications are necessary and that any modifications that might be required would not be material.

6. No Objections to Confirmation of the Plan. No objections to the Plan have been filed.

VOTING

I. All Classes Voting Except One Have Accepted the Plan.

On or before September 7, 2012, the Debtors will file the certification of Kenneth L. Cannon II, which summarizes the Ballots received by the Debtors from holders of Classified Claims and Interests, which are listed in the voting report (the "Ballot Report").

Creditors in all Classes other than Class 6 are impaired under the Plan and are entitled to vote on the Plan. Class 6 creditors are unimpaired and deemed to accept the Plan. Creditors in Classes 2, 3A, 3B, 3C. 3D. 3F. 3J, 4, 7, 9A, 10A, 10B, 10C, 12A, 12B, 12C, 13A, 13B, and 13C have voted to accept the Plan. Class 1 voted to reject the Plan. The vote of Raven Mining Company, LLC ("Raven Mining") to reject the Plan in Class 1 is the only vote to reject the Plan. In Classes 3E, 3G, 3H, 3I, 3K, 3L, 5, and 11, no votes were received. Classes 3M, 8, and 9B were created to classify unknown secured Mechanic's Lien Claims, unknown Secured Claims, and unknown Priority Claims against UBR, respectively. No one voted in any of these three

Classes, but likely because there is no claimant in any of them. Although several votes were cast in Class 9C, the Claims of those who voted in that Class have been objected to (as to priority, not as to allowance as general Unsecured Claims) and no motion for temporary allowance for voting purposes was filed, so there is no creditor entitled to vote therein.

ARGUMENT

The Plan satisfies all of the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

I. The Plan Should Be Confirmed

To confirm the Plan, the Debtors must show that the Plan satisfies each of the elements delineated by section 1129 of the Bankruptcy Code. *In re Winn Trucking, Inc.*, 236 B.R. 774, 778 (Bankr. D. Utah 1999). The Debtors must do so by a preponderance of the evidence. *In re Paige*, 2007 WL 4143212 *7 (Bankr. D. Utah 2007) (Thurman, J.)(citing *F.H. Partners, L.P. v. Investment Co. of the Southwest, Inc.*, 341 B.R. 298, 310 (10th Cir. BAP 2006) (discussing burden of proof in the context of section 1129(a)(11)). The Debtors submit that the Plan complies with all relevant sections of the Bankruptcy Code, Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code. This memorandum addresses each requirement individually.

A. The Plan Complies with Applicable Provisions of the Bankruptcy Code (Section 1129(a)(1)).

Section 1129(a)(1) of the Bankruptcy Code requires that a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. A principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan of reorganization. *Paige*, 2007

Wl 4143212 at *8, n.13; *Colorado Mountain Express v. Aspen Limousine Service* (*In re Aspen Limousine Service*), 193 B.R. 325, 340 (D. Colo. 1996); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977). Accordingly, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the Bankruptcy Code. As explained below, the Plan complies with sections 1122 and 1123 in all respects.

1. The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code.

The Plan satisfies section 1122's classification requirements. Section 1122 of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

Plan proponents have significant flexibility in placing substantially similar claims into different classes, provided there is a rational basis to do so. Courts have identified grounds justifying separate classification, including where members of a class possess different legal rights and where there are good business reasons for separate classification. *See Mirant Corp.*, No. 03-46590-MDL-11, 2007 WL 1258932, at *7; *In re Kaiser Aluminum Corp.*, No. 02-10429, 2006 WL 616243 (Bankr. D. Del. Feb. 6, 2006); *In re Chateaugay Corp.*, 10 F.3d 944, 956-57 (2d Cir. 1993); *In re Avia Energy Dev., L.L.C.*, No. 05-39339-BJH-11, 2007 WL 2238039, at *2 (Bankr. N.D. Tex. Aug. 2, 2007).

The Plan's classification of Claims and Interests into thirty-two Classes (some of which are sub-classes within Classes) satisfies the requirements of section 1122 because the Claims and/or the Interests in each Class differ from the Claims and/or Interests in each other Class in a legal or factual nature or based on other relevant criteria. The Plan classifies secured debt separately from unsecured debt. Plan, Arts. III, V. Each secured creditor is separately classified. Plan, Art. III; *In re Bugg*, 172 B.R. 781, 784 (E.D. Pa. 1994).

Unsecured Claims are classified in Classes 10A, 10B, 10C, 11, 12A, 12B, and 12C and equity Interests are classified in Classes 13A, 13B, and 13C. Claims in these Classes have been properly classified for purposes of section 1122 because "such claim[s] or interest[s are] substantially similar to the other claims or interests of such class[es]." Classes 10A, 10B, and 10C are comprised of general Unsecured Claims against CAR, UBR, and KTIA, respectively. Class 11 is comprised of the subordinated Unsecured Claims held by Rutter and Wilbanks Corporation ("R&W") against all three Debtors. Classes 12A, 12B, and 12C are comprised of Insider Unsecured Claims of CAR, UBR, and KTIA against each other. Classes 13A, 13B, and 13C consist of UBR's Interest in CAR, non-Debtor Utah Hydrocarbon Inc.'s Interest in UBR, and non-Debtor Korea Technology Industry Company, Ltd.'s Interest in KTIA.

Thus, in each instance of separate classification, the Plan classifies Claims based upon the different rights and attributes of such holders of Claims against the different Debtors. As such, valid factual and legal reasons exist for classifying separately the various Classes of Claims and Interests under the Plan. Additionally, each of the Claims in each particular Class is substantially similar to the other Claims or Interests in such Class. Thus, the Plan satisfies section 1122 of the Bankruptcy Code.

2. The Plan Satisfies the Eight Mandatory Plan Requirements Contained in Section 1123(a)(1)-(a)(8) of the Bankruptcy Code.

The Plan meets the mandatory requirements contained in section 1123(a). Specifically, section 1123(a)(1)-(8) requires that a plan:[1]

(1) designate classes of claims and interests;

(2) specify unimpaired classes of claims and interests;

(3) specify treatment of impaired classes of claims and interests;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for implementation of the plan;

(6) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors.

Articles III and IV of the Plan satisfies the first two requirements of section 1123(a) by: (a) designating Classes of Claims and Interests, as required by section 1123(a)(1) ; and (b) specifying that all Classes of Claims are either impaired or unimpaired, as required by section 1123(a)(2). Under the Plan, all classes of Claims except Class 6 are impaired. Article V of the Plan satisfies section 1123(a)(3) because it specifies the treatment of the impaired classes. For the reasons discussed above, the Plan also satisfies section 1123(a)(4) because the treatment of each Claim or Interest within a Class is the same as the treatment of each other Claim or Interest within that Class.

[1] 11 U.S.C. § 1123(a)(8) only applies only where the debtor is an individual, and therefore does not apply in this case where the Debtors are a business corporation and limited liability companies.

Section 1123(a)(5) requires that a plan provide "adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Article VII of the Plan provides adequate and proper means for the implementation of the Plan, including, without limitation, (i) the sale of substantially all of the Debtors' assets to R&W, (ii) the sale of substantially all of the Debtors' assets pursuant to an Alternative Sale, or (iii) the sale of substantially all of the Debtors' assets in an Auction. In case of the Sale to R&W, UBR will be merged or consolidated with KTIA. The transactions contemplated by the Plan are designed to maximize the value of the Debtors' business and assets. The approved sale to R&W will result in full payment of Allowed Claims, with interest to be paid on account of Allowed Secured Claims. An Alternative Sale or Auction may or may not result in sufficient sale proceeds to pay all Claims in full, but will provide a favorable means of selling the Debtors' assets. Accordingly, the Plan, together with the documents and agreements contemplated thereby, provide adequate means for implementation of the Plan as required by section 1123(a)(5) of the Bankruptcy Code.

Section 1123(a)(6) prohibits the issuance of nonvoting equity securities, and requires amendment of a debtor's charter to so provide. It also requires that a corporate charter provide an appropriate distribution of voting power among the classes of securities possessing voting power. The Plan provides at Section 7.3a. that the Reorganized Debtor will adopt reorganized articles of organization and a reorganized operating agreement which will include a provision prohibiting the issuance of non-voting equity securities. Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

Section 1123(a)(7) of the Bankruptcy Court requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with

public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." Section 7.2 of the Plan provides that Sung I. Lee will be Director and President of the Reorganized Debtor and that Soung Joon Kim will be Chief Operating Officer, subject to substitution, which would be disclosed in a supplement to the Plan. Mr. Lee and Mr. Kim are serving in these capacities in KTIA presently. Retention of current management as provided for in the Plan is consistent with the interests of creditors and equity security holders and public policy, and the Plan therefore satisfies section 1123(a)(7) of the Bankruptcy Code.

3. The Discretionary Contents of the Plan Are Appropriate.

Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan of reorganization. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. A plan also may provide for (a) "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or (b) "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest." 11 U.S.C. § 1123(b)(3)(A), (B) . A plan may also "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests. 11 U.S.C. § 1123(b)(4). Finally, a plan may "modify the rights of holders of secured claims, other than a claim secured by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims" and may

"include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(5), (6) .

Here, the Plan employs various provisions in accordance with section 1123(b)'s discretionary authority. For example, the Plan (i) provides for the sale of substantially all of the Debtors' assets, (ii) leaves one Class of Claims unimpaired, (iii) proposes treatment for and settlement of executory contracts, (iv) provides a structure for Claim allowance and disallowance, (v) provides for the settlement or adjustment of Claims or Interests, and (vi) sets forth a process to govern the distributions to Holders of Allowed Claims. *See*, respectively, Plan, Art. III (Designation of Claims and Interests), Art. V (Treatment of and Methods of Distribution to Classes Under the Plan), Art. VI (Provisions as to Disputed Claims and Distributions), Art. VII (Means for Execution of the Plan), Art. VIII (Executory Contracts), Art. IX (Discharge of the Debtor), and Art. XI (General Provisions).

B. The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(2))

The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. This section principally embodies the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code. *See In re Worldcom, Inc.*, No. 02-13533, 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code"). The Debtors have complied with section 1129(a)(2) of the Bankruptcy Code by distributing the Disclosure

Statement and soliciting acceptances of the Plan in the manner (described in the Disclosure Statement) that was approved by this Court.

Section 1125 prohibits the solicitation of acceptances or rejections of a plan of reorganization "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). The purpose of section 1125 is to ensure that parties in interest are fully informed regarding the condition of the debtor so that they may make an informed decision whether to approve or reject the plan. *See In re A.H. Robins Co., Inc.*, No. 98-1080, 1998 WL 637401, at *3 (4th Cir. Aug. 31, 1998) ("The disclosure statement must contain 'adequate information,' i.e. sufficient information to permit a reasonable, typical creditor to make an informed judgment about the merits of the proposed plan.").

Here, the Plan Proponents have satisfied the requirements under section 1125. The Bankruptcy Court approved the Disclosure Statement as containing adequate information about the Plan, and if any modifications are made, they will not be material. The Debtors mailed the Plan, Disclosure Statement, Ballots, the Court's Order approving the Disclosure Statement, and a notice of the confirmation hearing and deadlines associated therewith. Moreover, the Debtors have tabulated the votes on the Plan and have filed or will file that tabulation, along with the underlying ballots, with the Court.

C. The Plan Has Been Proposed In Good Faith And Not By Any Means Forbidden By Law (Section 1129(a)(3))

Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." In the context of section

1129(a)(3), a plan has been proposed in good faith where there is a "'reasonable likelihood that the plan will achieve its intended results which are consistent with the purposes of the Bankruptcy Code, that is, is the plan feasible, practical, and would it enable the company to continue its business and pay its debts in accordance with the plan provisions.'" *In re Pikes Peak Water Co.*, 779 F.2d 1456, 1459 (10th Cir. 1985) (quoting underlying bankruptcy court opinion). Section 1123(b)(4) clearly permits a plan to provide for the sale of all or substantially all of the property of the estate. In the Debtors' cases, the Plan provides for the sale of the assets and the payment of creditors (under the preferred sale to R&W, creditors will be paid in full) from the proceeds of the sale.

To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan. *See In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002); *see also In re Madison Hotel Assoc.*, 749 F.2d 410, 425 (7th Cir. 1984) (stating that to determine compliance with section 1129(a)(3)), the court examines the plan "in light of the totality of the circumstances surrounding confection of the plan.") (citation omitted). Accordingly, where the plan satisfies the purposes of the Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) is satisfied. *See T-H New Orleans*, 116 F.3d at 802 ("A debtor's plan may satisfy the good faith requirement even though the plan may not be one which the creditors would themselves design . . .."); *In re Briscoe Enters., Ltd., II*, 994 F. 2d 1160, 1167 (5th Cir. 1993) ("This Court has held that, 'Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied.'") (*quoting In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985)).

Here, the Debtors have proposed the Plan in good faith, with the legitimate and honest purpose of maximizing distributions to creditors through a favorable sale of the Debtors' assets. The Debtors have worked extraordinarily hard to bring their operations to a place where they are fully functional and are very attractive to buyers. In addition, the Debtors filed the current Plan, which amends an earlier iteration, after extensive discussions and negotiations with their largest secured creditors and R&W, to ensure that the Plan would be acceptable to creditors. The principal amendment to the new Plan was the addition of provisions for an Alternative Sale or Auction if the sale to R&W fails to close. The Plan provides for full payment to creditors under the sale to R&W and for payment of sale proceeds from an Alternative Sale or Auction and this is ample evidence to support that the Plan has been proposed in good faith as interpreted under the Bankruptcy Code. Additionally, the Plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.

D. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments (Section 1129(a)(4))

Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, by the debtor or by a person issuing securities or acquiring property under the plan, be subject to approval of the bankruptcy court as reasonable. Specifically, section 1129(a)(4) provides that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). This section of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and

approval by the Court as to their reasonableness. *See, e.g., Valley View Shopping Center*, 260 B.R. 10, 22-23 (Bankr. D. Kan. 2001); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992).

Here, all payments made or to be made by the Debtors for services rendered and expenses incurred in connection with the Debtors' chapter 11 cases, including, without limitation, all fees of the Professionals, must be filed with the Court and approved. Thus, the Plan complies fully with the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. The Debtors Have Disclosed All Necessary Information Regarding Management of the Reorganized Debtor (1129(a)(5))

Section 1129(a)(5) of the Bankruptcy Code requires that (i) the plan proponent disclose the identity and affiliations of the proposed management of the reorganized debtor, (ii) the appointment or continuance of such managers be consistent with the interests of creditors and equity security holders and with public policy, and (iii) there be disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtor.

Section 7.3b. of the Plan provides that the initial Director and President of the Reorganized Debtor will be Sung I. Lee and the initial Chief Operating Officer of the Reorganized Debtor will be Soung Joon Kim. Both are currently serving in the same or a similar position in KTIA. They have directed the operation of the Debtors through the cases and their retention is consistent with the interests of creditors, equity security holders, and with public policy.

F. The Plan Does Not Require Governmental Regulatory Approval for Rate Changes (Section 1129(a)(6)).

Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the debtor's plan. After confirmation of the Plan, the Debtors' business will not involve rates established or approved by, or otherwise subject to, any governmental regulatory commission. Thus, section 1129(a)(6) of the Bankruptcy Code is not applicable.

G. The Plan Is in the Best Interests of Creditors and Interest Holders Who Have Not Accepted the Plan (Section 1129(a)(7)).

Section 1129(a)(7) of the Bankruptcy Code, also known as the "best interest test," requires that, with respect to each class, each holder of a claim or an equity interest in such class either:

> (i) has accepted the plan;
>
> (ii) or will receive or retain under the plan property of a value, as of the effective date of the plan, which is not less than the amount that such holder would receive or retain if the debtors liquidated under chapter 7 of the Bankruptcy Code.

11 U.S.C. § 1129(a)(7)(A)(i)-(ii).

The best interest test applies to individual dissenting holders of claims and interest rather than classes, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization. *See 203 N. LaSalle St.*, 526 U.S. at 441 n.13 ("The "best interests" test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *see also In re Adelphia Commc'ns. Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (section 1129(a)(7) satisfied when impaired holder of

claim would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

The Debtors believe that the value of distributions if the chapter 11 cases were converted to cases under chapter 7 of the Bankruptcy Code would be less than the value of distributions under the Plan for a variety of reasons. A sale of the Debtors' assets by trustee unfamiliar with those assets and the Debtors' industry would almost certainly return less than a sale by the Debtors under any of the scenarios under the Plan. Conversion to chapter 7 would create or ripen additional claims. Damages claims for automatic rejection of certain unexpired leases and contracts would likely be triggered. In addition, the Debtors would incur the additional costs and expenses of a chapter 7 trustee and other professional fees relating to the chapter 7 wind-down.

As section 1129(a)(7) makes clear, the best interest test applies to all impaired classes unless all creditors in the class vote to accept the plan. All Classes in which any creditor has voted have unanimously accepted the Plan other than Class 1, which has only one creditor. As a result, the Debtors technically need to meet the requirements of the best interest test with respect to Class 1. Nevertheless, as the Debtors' Liquidation Analysis set forth in Exhibit 8 to the Disclosure Statement demonstrates, the Plan is expected to provide substantially higher recoveries to holders of most Claims than they would receive in a liquidation under chapter 7.

The Debtors acknowledge that Raven Mining, the secured creditor in Class 1, holds a Secured Claim which appears to have a higher priority than all other Secured Claims on most or all of the valuable assets of the Debtors. As a result, Raven will be paid in full under the Plan or chapter 7 under any scenario. The only question is the amount in which Raven's Claim will be

Allowed. Because Raven will receive at least as much under the Plan as it would in chapter 7, the Plan meets the best interest test with respect to Raven.

The Debtors submit, therefore, that each impaired and dissenting creditor holding an Allowed Claim will receive under the Plan a recovery no less than what it would receive pursuant to a liquidation of the Debtors under chapter 7 of the Bankruptcy Code.

H. Acceptance by Impaired Classes (Section 1129(a)(8)).

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. Pursuant to section 1126(c), a class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the claims in that class actually vote to accept the plan. A class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to have accepted the plan. 11 U.S.C. § 1126(f); *see In re Econ. Cast Stone Co.*, 16 B.R. 647, 651 (Bankr. E.D. Va. 1981); *Drexel*, 960 F.2d at 290 (an unimpaired class is presumed to have accepted the plan); S. Rep. No. 989, 95th Cong. 2d Sess. 123 (1978) (section 1126(f) of the Bankruptcy Code "provides that no acceptances are required from any class whose claims or interests are unimpaired under the Plan or in the order confirming the Plan."). Conversely, a class is deemed to have rejected a plan if the plan provides that the claims or interests of such class do not receive or retain any property under the plan on account of such claims or interests. *See* 11 U.S.C. § 1126(g).

As set forth in the Ballot Report, every voting impaired Class voted to accept the Plan except Class 1. However, because Class 1 did not vote to accept the Plan and because a number of Classes had no votes, section 1129(a)(8) is not satisfied, but as demonstrated below, the Plan

should be confirmed, because the requirements of section 1129(a)(10) that at least one impaired Class has accepted the Plan and of section 1129(b) for cramdown of dissenting classes, have been met.

I. The Plan Complies with Statutorily Mandated Treatment of Administrative And Priority Tax Claims (Section 1129(a)(9)).

Section 1129(a)(9) of the Bankruptcy Code requires that persons holding claims entitled to priority under section 507(a) receive payment in full in cash unless the holder of a particular claim agrees to a different treatment with respect to such claim.

Pursuant to Article II of the Plan, and in accordance with section 1129(a)(9), the Plan provides for the payment in full of Allowed Administrative Claims and Priority Claims. Under section 2.1, Partners shall pay the Allowed Administrative Claims (i) in the ordinary course of business, or (ii) on the Effective Date (or as soon as practicable thereafter) if not an ordinary course claim, or (iii) within ten (10) days of entry of a Final Order allowing such Administrative Claim. Pursuant to section 2.4, the Debtors and/or the Reorganized Debtor shall pay all fees due and payable to the Administrative Claim of the United States Trustee, under section 1930 of Title 28 within ten (10) days after the Effective Date. In addition, the Debtors or the Reorganized Debtor shall pay the United States Trustee quarterly fees due and payable on all disbursements, including plan payments and disbursements in and outside of the ordinary course of business until entry of a Final Decree, dismissal of the case or conversion of the case to a case under chapter 7, as such obligations become due.

Article II also provides for the payment of Allowed Priority Claims. Specifically, under Section 2.5 of the Plan each Holder of an Allowed Priority Tax Claim shall either receive full payment with applicable interest on the Effective Date or receive equal quarterly cash payments

over a period not exceeding five (5) years from the Petition Date, with the first payment to occur on the first business day of the third month after the Effective Date, with the first payment to occur on the first business day of the third month after the Effective Date at an annual interest determined under applicable nonbankruptcy law and calculated as specified in section 511(b) of the Bankruptcy Code.

Moreover, under section 2.6, all Allowed Priority Tax Claims that are not due and payable on or before the Effective Date shall be paid in the ordinary course of business as such obligations become due. All other Priority Claims shall be paid in full on the Effective Date or when allowed, with 10% interest.

Therefore, the Plan complies with the relevant provisions of section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders (Section 1129(a)(10)).

Section 1129(a)(10) of the Bankruptcy Code is an alternative requirement to section 1129(a)(8)'s requirement that each class of claims or interests must either accept the plan or be unimpaired under the plan. Section 1129(a)(10) provides that to the extent there is an Impaired Class of Claims, at one least Impaired Class of Claims must accept the Plan, excluding acceptance by any Insider. 11 U.S.C. § 1129(a)(10); *see also Econ. Cast Stone*, 16 B.R. at 651 (at least one impaired class must affirmatively accept the plan). Here, Classes 2, 3A, 3B, 3C, 3D, 3F, 3J, 4, 7, 9, 10A, 10B, 10C, 12A, 12B, 12C, 13A, 13B, and 13C voted to accept the Plan. *See* Ballot Report. Therefore, the Plan satisfies the requirement of section 1129(a)(10).

K. The Plan Is Feasible (Section 1129(a)(11)).

Section 1129(a)(11) of the Bankruptcy Code requires that the bankruptcy court find that a plan is feasible as a condition precedent to confirmation. Specifically, the bankruptcy court must determine that:

> [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11).

To demonstrate that a plan is feasible, it is not necessary that success be guaranteed. *See In re Adamson Co., Inc.*, 42 B.R. 169, 174 (Bankr. E.D. Va. 1984). Rather, a plan must be workable and have a reasonable likelihood of success. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *Pikes Peak*, 779 F.2d at 1460; *Investment Co. of the Southwest*, 341 B.R. at 310-11. The central question is whether there is a reasonable probability that the plan can be performed. As the Tenth Circuit stated, "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *Pikes Peak*, 779 F.2d at 1460.

As demonstrated below, the Plan meets the feasibility requirement set forth in section 1129(a)(11) of the Bankruptcy Code, as confirmation is not likely to be followed by liquidation or the need for further financial reorganization. The Debtors believe that the approved sale to R&W will close and that there will be sufficient sale proceeds to pay all creditors in full as set forth in the Plan. They will present or proffer evidence regarding the status of the sale to R&W, which hinges largely on R&W's ability to obtain sufficient investment from third parties to close

the sale. Even if that sale does not close, however, the Alternative Sale and Auction provided for under the Plan should result in the sale of the Debtors' assets and payment of at least Allowed Secured Claims.

With funds borrowed from R&W under the Startup DIP Financing Facility (see the discussion of the Startup DIP Financing Facility in Section II.I. in the Disclosure Statement), the Debtors have completed the "dry froth circuit" portion of their tar sands processing facility and have successfully produced "dry froth," a petroleum product from tar sands which can be used in road construction applications. This asphalt product should be highly competitive in the asphalt market and may be superior to other asphalt products. The successful production of dry froth is one of the significant goals that the Debtors have had for several years, but have been without sufficient capital funding to complete the dry froth circuit portion of the processing facility to prove the technology. Now, the question regarding the technology is largely answered, making the Debtors assets significantly more saleable than they were before.

The other significant assets of the Debtors are the tar sands in real property owned by UBR and leased from UBR by CAR. The Debtors have not yet received from consultants the final reports regarding tar sands reserves or regarding an economic mining plan for the extraction of the tar sands for processing. Nevertheless, the Debtors are confident that they hold significant tar sands reserves and that those reserves can be mined economically and make the Debtors' operations extremely valuable.

Because the Debtors' dry froth circuit portion of their tar sands processing facility has been successfully completed and has successfully produced dry froth in commercial amounts and

because its tar sands reserves appear to be significant and mineable in economically-feasible ways, the Debtors' assets should sell for significant sale sums. Thus, the Plan is feasible.

L. The Plan Provides for the Payment of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12))

Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930. Section 2.4 of the Plan provides that the Debtors shall pay all fees to the U.S. Trustee within ten (10) days after the Effective Date. In addition, the Debtors or the Reorganized Debtor shall pay the United States Trustee quarterly fees due and payable on all disbursements, including plan payments and disbursements in and outside of the ordinary course of business until entry of a Final Decree, dismissal of the case or conversion of the case to a case under chapter 7, as such obligations become due. The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

M. The Plan Does Not Modify Retiree Benefits (Section 1129(a)(13))

Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue to be paid post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. The Debtors do not have any obligations on account of retiree benefits (as such term is used in section 1114) and, therefore, section 1129(a)(13) of the Bankruptcy Code is inapplicable.

N. Section 1129(a)(14), (a)(15), and (a)(16) Are Inapplicable

Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations, and, as such, this section of the Bankruptcy Code does not apply. Section 1129(a)(15) applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). The

Debtors are not "individuals." Finally, section 1129(a)(16) of the Bankruptcy Code provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust be made in accordance with applicable provisions of non-bankruptcy law; however, as the Debtors are business or commercial corporations or limited liability companies, this section is not applicable.

O. The Plan Satisfies the "Cramdown" Requirements (Section 1129(b))

Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a), except for section 1129(a)(8), are met, a plan shall be confirmed so long as it does not discriminate unfairly and is fair and equitable with respect to each class of claims and interests that is impaired and has not accepted the plan. *See* 11 U.S.C. § 1129(b)(1); *Heins v. RUTI-Sweetwater, Inc.* (*In re RUTI-Sweetwater, Inc.*), 836 F.2d 1263, 1265 (10th Cir. 1988). Thus, to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes. *See In re Catron*, 186 B.R. 194, 197 (Bankr. E.D. Va. 1995); *Schwarzmann*, 203 B.R. at 923, 925; *Adamson*, 42 B.R. at 173-74. As discussed below, the Debtors meet the "cramdown" requirements in section 1129(b) of the Bankruptcy Code to confirm the Plan.

1. <u>The Plan Is Fair and Equitable with Respect to Impaired Classes that Have Not Voted to Accept the Plan</u>.

Section 1129(b)(2) of the Bankruptcy Code defines the phrase "fair and equitable" in relevant part as follows:

(A) With respect to a class of secured claims, the plan provides –

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that the holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims –

(i) that the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or. . .

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

11 U.S.C. § 1129(b)(2).

The Plan meets the requirements of section 1129(b) for cramdown as to Classes that did not vote to accept the Plan. Under the Tenth Circuit's *RUTI-Sweetwater* decision, 836 F.2d at 1263, a class of secured claims may be presumed to have accepted the plan if all holders of claims in that class fail to vote and do not object to the plan. *Id.* at 1266-68. No votes were received in Classes 3E, 3G, 3G, 3H, 3I, 3K, 3L, or 5, nor did any creditor in any of these Classes object to confirmation of the Plan. As the appeals court held, "Once acceptance was properly presumed, the court was not obligated to inquire as to whether the Plan discriminated

unfairly or was not fair and equitable to the [secured creditors] under § 1129(b). When the [secured creditors] failed to object to the Plan, they waived their right to challenge the Plan or to assert, after the fact, that the Plan discriminated unfairly and was not fair and equitable." *Id.* at 1268.

Even if this Court were not to follow *RUTI-Sweetwater*, the Plan meets the standards for cramdown under section 1129(b) as to Secured Classes. Class 1, which did vote against the Plan and to which, therefore, *RUTI-Sweetwater* may not apply, may be crammed down under section 1129(b), as well as the Secured Classes in which no votes were cast. If the sale to R&W closes, all Allowed Claims will be paid in full and Allowed Secured Claims will be paid in full with interest and, in some cases, with attorney's fees. This clearly meets the requirements for fair and equitable treatment under section 1129(b)(2)(A). Under an Alternative Sale or an Auction, the one creditor certain to be paid in full is Ravens, because of its superior lien provision. All holders of Allowed Secured Claims in these Classes will retain their liens pending satisfaction of their Claims until the Claims are paid in full or until no collateral (the original collateral or proceeds of collateral) securing the Claim remains. Because the Debtors' assets will be sold free and clear, the secured creditors' liens will attach to the proceeds of sale in the same priority, with the same validity, and to the same extent that their liens attached to the original collateral.

The Plan also meets the requirements for cramdown of Unsecured Classes under section 1129(b)(2)(B). No Unsecured Class has voted to reject the Plan, but Class 11, consisting of R&W's subordinated Unsecured Claims, did not vote. The rule in *RUTI-Sweetwater* may also apply to this Class, but if it does not, the Plan meets the statutory requirements for cramdown of

Class 11. The non-insider, non-subordinated Classes of Unsecured Claims have all voted unanimously (of those voting) to accept the Plan. Only Class 11 (subordinated Unsecured Claims of R&W) has not voted to accept the Plan (it simply has not voted).

In the case of the sale to R&W, R&W's subordinated Unsecured Claims in Class 11 are simply treated as part of R&W's purchase price for the Debtors' assets and will receive no distribution. If the R&W sale does not close, R&W will receive from the proceeds of the Alternative Sale or the Auction an amount up to the full principal amount of its Unsecured Claims. In such case, no distribution will be made on account of insider Unsecured Claims in Classes 12A, 12B, or 12C unless and until Allowed Class 11 Unsecured Claims are paid in full, and no distribution will be made on account of Interests. Because no subordinate Claims or Interests will receive any distributions unless and until Class 11 is satisfied in full, the requirements that the Plan be fair and equitable to Class 11 is met.

The Plan is fair and equitable in its treatment of Classes 1 and 11 (and is also fair and equitable with respect to other Secured Classes in which no Ballots were submitted, even if *RUTI-Sweetwater* is not followed), and the fair and equitable requirement for cramdown under section 1129(b) of the Bankruptcy Code is, therefore met.

2. The Plan Does Not Unfairly Discriminate with Respect to Impaired Classes that Have Not Voted to Accept the Plan.

The Plan does not discriminate unfairly with respect to Class 1 or to any of the Classes in which no votes were cast. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists. *See In re 203 N. LaSalle St. Ltd. P'ship.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the

limits of fairness in this context have not been established"). Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists. *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis."); *see also In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances"). Most courts generally inquire into whether there is a reasonable basis for the discrimination and whether the debtor can confirm and consummate a plan without the proposed discrimination. *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003); *In re Crosscreek Aparts., Ltd.*, 213 B.R. 521, 537 (Bankr. E.D. Tenn. 1997) ("[A]t a minimum there must be a rational or legitimate basis for the discrimination and the discrimination must be necessary for the reorganization").

In the instant case, Holders of Claims and Interests are being paid in accordance with their relative priority. There is no discrimination, except with respect to the Unsecured Claims of R&W for repayment of the Startup DIP Financing Facility, and, as noted below, R&W agreed that repayment obligations, other than for proceeds extended to CAR for tar sands extraction costs (approximately $550,000 of the $6,500,000 full funding of the Startup DIP Financing Facility, would be subordinated to payment of other Allowed Unsecured Claims, even prepetition Unsecured Claims.. If the sale to R&W does not close and there are insufficient sale proceeds to satisfy all Claims, the various priorities of Secured Claims will have to be resolved, but payments will be in accordance with those priorities.

Class 11 contains the Unsecured Claims of R&W. These Claims are classified separately from other Unsecured Claims because of the subordination of repayment obligations to R&W under the approved Startup DIP Financing Facility.

A subordination agreement, particularly one approved by the Court, is enforceable in bankruptcy "to the same extent that such agreement is enforceable under applicable nonbankruptcy law." 11 U.S.C. 510(a); *see also In re 203 North LaSalle St. P'ship*, 246 B.R. 325, 329 (Bankr. N.D. Ill. 2000). R&W freely entered into the Startup DIP Financing Facility fully aware that repayment obligations, other than certain ones associated with "extraction costs" were both unsecured and subordinated to other, even prepetition Unsecured Claims. The legislative history of Section 1129(b)(1) recognizes that implementation of the terms of a subordination agreement through a difference in treatment is proper and not unfair discrimination. See H.R. 595, 95th Cong. (1977) (indicating that Congress considered subordination agreements to be "one circumstance which would support disparate treatment" under 11 U.S.C. 1129(b)(1)). Under the clear and unambiguous terms of the Startup DIP Financing Facility, repayment obligations to R&W are subordinated to other Unsecured Claims.

The Plan does not discriminate unfairly and this requirement for cramdown is also met.

CONCLUSION

Because the Plan and its proponents, the Debtors, meet all the requirements for confirmation of the Plan under section 1129(a) and, with respect to Classes of Claims that did not vote for the Plan, under section 1129(b) of the Bankruptcy Code, the Debtors respectfully request that the Court confirm the Plan.

DATED this 6th day of September, 2012.

DURHAM JONES & PINEGAR, P.C.

By: /s/ Kenneth L. Cannon II

Steven J. McCardell (2144)
Kenneth L. Cannon II (3705)
111 East Broadway, Suite 900
P.O. Box 4050
Salt Lake City, Utah 84110-4050
Telephone: (801) 415-3000
Facsimile: (801) 415-3500

Attorneys for the Debtors

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2012, I caused to a copy of the foregoing Debtors' Memorandum of Law in Support of Confirmation of Their First Amended Joint Plan of Reorganization Dated July 25, 2012 to be served via ECF Notification, electronic mail, and/or first-class mail, postage prepaid, on the parties listed on the attached page.

/s/ Kristin Hughes

James W. Anderson - anderson@mmglegal.com

Darwin H. Bingham - dbingham@scalleyreading.net, cat@scalleyreading.net

Matthew M. Boley - mmb@pkhlawyers.com, dh@pkhlawyers.com

Laurie A. Cayton tr - laurie.cayton@usdoj.gov, James.Gee@usdoj.gov; Lindsey.Huston@usdoj.gov; Rinehart.Peshell@usdoj.gov; Suzanne.Verhaal@usdoj.gov

Victor P Copeland - vpc@pkhlawyers.com, dh@pkhlawyers.com

Joseph M.R. Covey - calendar@parrbrown.com

Robert D. Dahle - bobdahle@aol.com, robertdahlejr@gmail.com

David R. Hague - dhague@fabianlaw.com, dromero@fabianlaw.com

George B. Hofmann - gbh@pkhlawyers.com, dh@pkhlawyers.com

Gary E. Jubber - gjubber@fabianlaw.com, mparks@fabianlaw.com; dromero@fabianlaw.com

David E. Leta - dleta@swlaw.com, wsmart@swlaw.com

Blake D. Miller - miller@mmglegal.com

Gregory S. Moesinger - gmoesinger@kmclaw.com, lfrankis@kmclaw.com

Robert S. Prince - rprince@kmclaw.com, squilter@kmclaw.com

Shawn T. Richards - srichards@kmclaw.com

Daniel S. Sam - dsamlaw@ubtanet.com, hiatt6152@msn.com;gretchen.johns@srelaw.net

Jeremy C. Sink - jeremy@mbt-law.com

James A Sorenson - jsorenson@rqn.com, tpahl@rqn.com;docket@rqn.com

Bradley L. Tilt - brad@actionlawutah.com, rmellor@fabianlaw.com

United States Trustee - USTPRegion19.SK.ECF@usdoj.gov

Securities & Exchange Commission
Attn: Bankruptcy Dept.
44 Montgomery Street #1100
San Francisco, CA 94104-4613

Department of Natural Resources
Division of Oil Gas & Mining
Attn: Ms. Leslie Heppler
P O Box 145801
Salt Lake City, UT 84114-5801

Uintah County Treasurer
Attn: Wendi Long
147 East Main
Vernal, UT 84078-2643